

SEX NEUTRALITY

DORIANE LAMBELET COLEMAN*

INTRODUCTION

This article closes out the volume on Sex in Law in which it appears with reflections on the normative question whether it would be best on balance if the law were to evolve to be sex neutral. Specifically, it considers whether—as some observers and policymakers have suggested—we would be better off if law could not see or act on the basis of sex, and if it prohibited regulated institutions from doing the same. Arguably, this move is the next logical step in the evolution of law’s treatment of sex from its historical use as a basis for ordering society according to the state’s general police powers to its increasingly limited modern use by both the states and the federal government as a basis for addressing discrimination and the differences that continue to stand in the way of sex equality.

Because the question focuses on the law’s attention to biology, throughout I use the word “sex” in its still standard sense, to mean “either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions);”¹ or, one of the two sets of physical traits that together make up what we commonly think of when we hear and say “sex.”² Although it’s popular in this period to say that sex isn’t

Copyright © 2022 by Doriane Lambelet Coleman.

*Professor of Law, Duke Law School. I am grateful to my students Dev Madeka and Meredith Criner for their careful work below the line; to Kim Krawiec for her collaboration on the larger project and her helpful comments specifically on this paper; and to David Boyd, Joanna Harper, Larry Helfer, Madeline Pape, Josh Safer, Ed Schiappa, Wick Shreve, and Kathleen Stock, among others, for important, provocative conversations along the way. That the “others” are unnamed speaks to the complexity of our times but not to their significance to me. The views ultimately expressed here are entirely mine.

1. *Sex*, OXFORD ENG. DICTIONARY, <https://www.oed.com/viewdictionaryentry/Entry/176989> (last visited Jan. 10, 2022); *see also* *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1756 (2020) (Alito, J., dissenting) (citing Oxford English Dictionary, along with other dictionaries, defining sex similarly). This article is part of a volume designed to examine the meaning and role of biological sex in law, particularly as distinguished from gender, i.e., as distinguished from social constructions of and related to sex. *See generally* Doriane Lambelet Coleman and Kimberly D. Krawiec, *Foreword*, 85 LAW & CONTEMP. PROBS., no. 1, 2022, at 1 (setting out the premise of the volume and summarizing the contributions, including those that focus on sex stereotypes). The specific questions whether gender identity is biologically determined and whether, if so, it is one of the characteristics in the set of sex traits, are discussed in Joshua D. Safer, *A Current Model of Sex Including All Biological Components of Sexual Reproduction*, 85 LAW & CONTEMP. PROBS., no. 1, 2022.

2. *See* JULIA E. RICHARDS & R. SCOTT HAWLEY, *Sex Determination: How Genes Determine a Development Choice*, in *THE HUMAN GENOME*, (3d ed. 2011) (setting out the primary and secondary sex characteristics associated with males on the one hand and with females on the other, including chromosomal differences, gonadal differences, endocrine differences, genital differences, and the anatomical and physiological differences that develop in puberty based on whether the individual is male or female).

binary,³ in this reproductive sense it undoubtedly is: Apart from the extremely rare incidence of ovotesticular disorder,⁴ we either have testes that produce small gametes (sperm), or we have ovaries that produce large gametes (eggs).⁵ Moreover, “[a]lthough there is some dispute at the margins, it is generally accepted that . . . more than 99% of the time, an individual’s biological sex traits are fully concordant;”⁶ that is, our primary and secondary sex characteristics—including our external phenotypes—almost always distribute bimodally based on whether we have or don’t have a Y chromosome.⁷ As I’ve written elsewhere, to see sex as a spectrum or as merely a constellation of sex-linked traits requires turning a blind eye to this fact and its significance.⁸ Specifically, together with the related fact that “[s]ex differences . . . exist in the first instance as a reproductive and species imperative,”⁹ “this biology, including the bimodal distribution, is the basis for the ubiquity of sex as a societal taxonomy.”¹⁰

This doesn’t necessarily mean, however, that the law should account for these differences. Indeed, the question whether—the biology and ubiquity of the taxonomy notwithstanding—the law should be sex neutral is both current and recurring. That is, we are pressed to consider it today by some of the same groups that have posed it in the past, including those that take one or more of these positions: Law that demands equality should express equality. The best way for the law to contribute to the dismantling of structural “isms”—including sexism—is by forcing neutrality. All forms of group-based affirmative action are inherently unjust. Gender minorities but also females are likely to fare better in the long run if sex is removed from any calculus that yields social goods. Unusual political bedfellows are the norm here, even as related questions about how sex is defined and what sexism is still fair game are front and center in the culture wars. As a result, the debates are more significant and disruptive than they

3. For an explanation of how gender scholars and others have managed to blur the binary, see Doriane Lambelet Coleman, *Sex in Sport*, 80 LAW & CONTEMP. PROBS., no. 4, 2017 at 114–16.

4. Individuals with ovotesticular disorder have both testicular and ovarian tissue. Meltem Özdemir et al., *Ovotesticular Disorder of Sex Development: An Unusual Presentation*, 9 J. CLIN. IMAGING SCI. 34 (2019) (“formerly known as ‘true hermaphroditism,’ . . . [it] is the rarest disorder of sex development in humans. Its prevalence has been reported to be less than 1/20,000.”).

5. Georgi K. Marinov, *In Humans, Sex is Binary and Immutable*, SPRINGER NATURE (May 9, 2020), reprinted in 33 ACAD. QUEST. 279 (2020); see also John C. Achermann & Ieuan A. Hughes, *Pediatric Disorders of Sex Development*, in WILLIAMS TEXTBOOK OF ENDOCRINOLOGY 893–963 (Shlomo Melmed et. al eds., 13th ed, 2015).

6. EDWARD SCHIAPPA, *THE TRANSGENDER EXIGENCY: DEFINING SEX AND GENDER IN THE 21ST CENTURY*, at 23 (2021) (summarizing recent estimates of persons with differences of sex development); Coleman, *Sex in Sport*, *supra* note 3 at 82–83 (citing standard references detailing incidence of differences of sex development).

7. Coleman, *Sex in Sport*, *supra* note 3 at 83. Assuming Josh Safer is right that “gender identity” or “brain sex” is also a biological sex trait, see Safer, *supra* note 1, the percentage of atypical cases increases to more than 1% of the population, but never so high as to trouble the distinct bimodal distribution.

8. *Id.* at 114–16.

9. *Id.* at 116.

10. *Id.* at 83.

were in earlier periods, an indicator of the kind of great social upheaval that tends to make for the development of new law in the Anglo-American tradition.

In this article, I briefly summarize the history of sex in law (Structural Sexism) and the reforms of the nineteenth and twentieth centuries (Sex Skepticism) before turning to the current moment in which these debates are taking place (Sex Neutrality). In this context, I describe and then counter the arguments in favor of sex neutrality on the grounds that sex is real, it is significant for individuals and the society in ways that matter to good governance, and it is precisely the law's role to take such taxonomies into account in the fulfillment of its institutional mission. The article concludes with an effort to settle the terms on which disparately motivated groups might agree to pursue commonly held objectives.

I

STRUCTURAL SEXISM

In most societies, law is the institution that is principally responsible for social ordering; that is, for establishing and maintaining the structure and the specific rules according to which the government will operate and the people will interact with the government and with each other. This includes their respective authorities and obligations, rights and responsibilities. At their most basic, the law's structure and rules provide for physical order, continuity or sustenance, and protection. When a political community has the luxury and inclination to do more, the law is also the institution that further orders society—and fixes problems—according to prevailing norms and dictates.

Both of the law's institutional roles are political in the first instance and the lines between them are blurred at the margins, but they are also importantly different. Where the first is focused on the basics of the social compact, including the existence, safety, survival, and success of the political community, the second is focused on the political community's cultural and normative preferences over time. The legal history of sex is concerned with both of these roles.

Thus, at its origins and for much of its history, the law used sex as a basis both to structure society for basic physical order, continuity, and protection, and to regulate the details of people's lives according to prevailing social norms and dictates. I am not the first to borrow the term and concept from race scholars: For centuries, sex and sexism were constitutive of the structure of the law, they were some of its principal bones, simultaneously reflecting and expressing deeply held societal norms and practices. Drawing from our sexually dimorphic physical bodies and their functional differences,¹¹ the law's provisions for allo-

11. Although humans exhibit lower degrees of sexual dimorphism than many other species, group-based sex differences within the species are significant. See generally Roxani Angelopoulou, Giakos Lavranos, & Panagiota Manolakou, *Establishing Sexual Dimorphism in Humans*, 30 COLL. ANTROPOL. 653 (2006). Beyond our binary reproductive functions, group-based differences in size, strength, power,

cating the land (primogeniture), defending it and the political community it contained (conscription), ensuring sustainability through reproduction (coverture and consortium), and generally running things (separate spheres) contemplated distinct sets of rights and responsibilities for males and females living in freedom.

Although focused on females, Justice Bradley famously summarized this generally sexed state of affairs in his 1872 concurring opinion in *Bradwell v. Illinois*:

It certainly cannot be affirmed, as an historical fact, that [“engag[ing] in any and every profession, occupation, or employment in civil life”] has ever been established as one of the fundamental privileges and immunities of the [female] sex. On the contrary, the civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman’s protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded on divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. So firmly fixed is this sentiment in the founders of the common law that it became a maxim of that system of jurisprudence that a woman had no legal existence separate from her husband, who was regarded as the head and representative in the social state; and notwithstanding some recent modifications of this civil status, many of the special rules of law flowing from and dependent of this cardinal principle still exist in full force in most States. One of these is, that a married woman is incapable, without her husband’s consent, of making contracts which shall be binding on her or him. This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.¹²

Because the law considered that enslaved men and women were chattel, they were differently encumbered, for my purposes here most importantly by the legal principle of *partus sequitur ventrem*. In a reversal of the standard common law rule, *partus* was designed to ensure that an enslaved woman’s “increase” would belong to her enslaver, and thus provided that the status of the

speed, and endurance are well understood, *see, e.g.*, Dr. Benjamin D. Levine et al., *The Role of Testosterone in Athletic Performance* (Jan. 2019), available at https://law.duke.edu/sites/default/files/centers/sportslaw/Experts_T_Statement_2019.pdf [<https://perma.cc/7N3N-6PUR>]; and others are subject to ongoing study, *see, e.g.*, Daniel F. Deegan, Priya Nigam, & Nora Engel, *Sexual Dimorphism of the Heart: Genetics, Epigenetics, and Development*, *Front. 8 CARDIOVASC. MED.* (May 26, 2021); Eladio J. Márquez et al., *Sexual-Dimorphism in Human Immune System Aging*, 11 *NATURE COMMUNICATIONS* 751 (2020); Jonathan C.K. Wells, *Sexual Dimorphism of Body Composition*, 21 *BEST PRACTICE & RES. CLINICAL ENDOCRINOLOGY & METABOLISM* 415 (2007).

12. 83 U.S. 130, 139, 141 (1872) (holding that “the right to control and regulate the granting of license to practice law in the courts of a State is one of those powers which are not transferred for its protection to the Federal government, and its exercise is in no manner governed or controlled by citizenship of the United States in the party seeking such license”). It would take another one hundred years before Justice Ginsburg would litigate the cases and write the opinions that also recounted this history but that came out the other way. *See infra* note 26 and accompanying text (summarizing these accomplishments).

newborn child followed that of its mother.¹³ As this 1662 Virginia statute clarified, *partus* applied whether the child’s father was black and living in slavery or white and living in freedom:

Whereas some doubts have arisen whether children got by any Englishman upon a negro woman shall be slave or free, Be it therefore enacted and declared by this present grand assembly, that all children borne in this country shall be held bond or free only according to the condition of the mother—*Partus Sequitur Ventrem*.¹⁴

From January 1, 1808, when it became illegal to import Africans destined for bondage from a foreign country,¹⁵ until Emancipation, the sustainability of the country’s slave population depended on domestic trading of already-born slaves and by its “increase” through the operation of *partus* doctrine. In an extraordinarily cynical and devastating irony, the law had enslaved black women not only producing slaves, but also in the process condemning their children to a life in bondage.

From these bones, more rules—both formal and informal—fleshed out the details of people’s lives. By the nineteenth and through much of the twentieth centuries, prevailing norms and dictates concerning or linked to sex had become extraordinarily detailed, and the law followed suit. Thus, for example, the law came to use sex in the establishment of different ages of marriageability and majority for males and females,¹⁶ the different alcohol content of the beer that could be sold to each at younger ages,¹⁷ and the circumstances in which one could sell goods on the street or in public,¹⁸ and be or work in a bar.¹⁹

All of this sexism necessitated that the government, institutions, and the citizenry be able to identify and distinguish males from females, and that everyone conform to script, and so the law also attended to these details. Names, dress, and behavior matching up to the gendered script were usually a good proxy for

13. “Increase” is a term of art taken from the rearing and raising of livestock. *See, e.g.,* *Wightman v. King*, 31 Ariz. 89 (1926) (“Where a buyer of range cattle . . . left the seller’s brands on them, placed it on their increase, and let them roam . . . he could not claim such cattle against mortgagee of seller or against purchasers at foreclosure sale”). *See also* J. David Hacker, *From ‘20. and odd’ to 10 million: The growth of the slave population in the United States*, 41 *SLAVERY ABOL.* 4, 840–55 (May 13, 2020) (summarizing the historical data and using the term).

14. Jennifer L. Morgan, *Law, Race, and Reproduction in Colonial Slavery*, 22 *SMALL AXE* 1 (Mar. 1, 2018) (citing to the Laws of Virginia, 1662 Act XII; Latin added by William Henig, *The Statutes at Large*, 1819); *see generally* Kirsten E. Wood, *Gender and Slavery* in *THE OXFORD HANDBOOK OF SLAVERY IN THE AMERICAS* (Mark M. Smith & Robert L. Paquette eds., July 2010).

15. An Act to Prohibit the Importation of Slaves, 9-22, 2 Stat. 426, Chap. 22 (1808).

16. For a summary of the history of the legal age for marriage in the U.S. *see, e.g.,* Nicholas Syrett, *Child Marriage is Still Legal in the U.S.*, *THE CONVERSATION*, (Dec. 11, 2017), <https://theconversation.com/child-marriage-is-still-legal-in-the-us-88846> [https://perma.cc/MT5L-ZKAQ]. For an example of distinctions on the basis of sex in the age of legal majority, *see, e.g.,* *Craig v. Boren*, 429 U.S. 190 (1976) (noting that “[b]efore 1972, Oklahoma defined the commencement of civil majority at age 18 for females and age 21 for males”).

17. *Id.* (holding that Oklahoma law distinguishing between males and females for this purpose was unconstitutional).

18. *Prince v. Massachusetts*, 321 U.S. 158 (1944) (state law providing that boys can starting at age twelve, but girls need to be at least eighteen).

19. *Goesaert v. Cleary*, 335 U.S. 464, 465 (1948).

physical sex, but when they weren't—for example when an individual presented in genderless or confusingly fluid ways—the law wasn't averse to conducting physical examinations, sometimes attended by “juries of matrons,” to clarify the matter.²⁰ Furthermore, when individuals chose to violate established norms and scripts, including in expressing transgender identities and other than heterosexualities, the law first sanctioned then criminalized them before medicine eventually took over, the latter always with the law's at least indirect approval.²¹

Consistent with our federal form of government and the primacy of states' rights, especially in the pre-modern era, aside from the statute providing for federal conscription into the Union Army during the Civil War,²² these laws were enacted by states and localities. Property, contract, family, and trusts and estates law were in issue, but also general health, welfare, and morals laws enacted pursuant to the jurisdiction's police powers. Over time, the law came to be sexed from its structure through its walls to its veneer—reflecting both the institution's basic role in ordering society and its advanced role in reflecting society's prevailing norms and dictates.

II

SEX SKEPTICISM

The more detailed the law got and the more its rules proliferated, the more obvious it became that most of it was based not in sex itself, or even in the administrative efficiencies inherent in group-based distinctions, but rather in irrational sex stereotypes—that is, in complicated or simply false assumptions about the ways in which sex affects or determines aptitudes and capacities, and the ways in which it should affect or determine presentation, behavior, and social role. Thus, that females as a group are affected by pregnancy, childbirth, and childrearing (including breastfeeding) in ways that males aren't is sex-linked fact, but the move from this to the position that, as a result, females lack cognitive capacity in relation to males is false stereotype; the use of that stereotype legally to prohibit female participation in the professions and in civic life is not only misogynistic, it lacks rational basis.²³ That males as a group are stronger and more powerful than females as a group is sex-linked fact, but the move from this to the position that, as a result, only males are good soldiers who can't

20. See, e.g., the case of Thomas(ina) Hall in Katrina C. Rose, *A History of Gender Variance in Pre-20th Century Anglo-American Law*, 14 TEXAS J. OF WOMEN & THE L. 77 (2004); see generally Sara M. Butler, *More than Mothers: Juries of Matrons and Please of the Belly in Medieval England*, 37 L. & HIST. REV. 2 353 (2019) (situating juries of matrons as sui generis in the common law's “all-male system”).

21. Anne Goldstein, *Organizing and Arguing Sex and Gender*, 85 LAW & CONTEMP. PROBS., no. 1, 2022; Anthony Kreis, *Unlawful Genders*, 85 LAW & CONTEMP. PROBS., no. 1, 2022.

22. The Conscription Act of 1863 was enacted to address the “low number of men volunteering to serve in the Union army” which “continued to rely mostly on volunteers.” See *Conscription Act, The Civil War: The Senate's Story*, U.S. SENATE (last visited Jan. 10, 2022), https://www.senate.gov/artandhistory/history/common/civil_war/ConscriptionAct.htm [<https://perma.cc/8U6G-38HU>].

23. Richard Chused, *Sex, Stamina, and Politics*, 85 LAW & CONTEMP. PROBS., no. 1, 2022.

“mother” children is false stereotype; the use of that stereotype legally to restrict conscription to males and to deny them parenting rights is not only misandry, it lacks rational basis.²⁴ The further moves from these stereotypes to the legal codification of sex-associated, normative standards of dress, occupation, association, and comportment—including as these target or affect gender conforming and nonconforming people—not only reflects misogyny, misandry, homophobia, and transphobia, it lacks rational basis.²⁵

Stereotypes about sex and sex-linked traits were increasingly subject to both recognition and challenge in the turbulent period and contexts in which they were developed. The post-Revolutionary War period to the mid-twentieth century was a time of extraordinary social, cultural, and political upheaval, which included not only the divorce from England and the founding of the Republic, but also: industrialization, urbanization, non-Anglo immigration, and the development of public education; the build-up to Secession, the Civil War, Abolition, Reconstruction, and Jim Crow; and the development of the liberal democratic ideas that largely drove these changes. Because of the law’s patriarchal bones, the resistance to structural sexism wasn’t as quick or immediately successful as the conservative establishment at policymaking around sex, but in concert with the resistance to structural racism, it strengthened over time.

Among the most important of the early related successes was undoubtedly the set of Reconstruction Amendments—the Thirteenth Amendment (prohibiting slavery and involuntary servitude), the Fourteenth Amendment (addressing citizenship, equal protection, privileges and immunities, and due process), and the Fifteenth Amendment (prohibiting race- but not sex-based restrictions on voting rights). Although adopted specifically to resolve political divisions among the states in the aftermath of the Civil War, including to address slavery and the legal condition of black people, because its text is race-neutral, the Fourteenth Amendment in particular became a general source of rights—also for females without regard to race. As the women’s rights movement looked for legal strategies to advance their equality project, the development of Fourteenth Amendment law—and especially of Equal Protection Clause doctrine—by Thurgood Marshall and other lawyers fighting structural racism laid the groundwork for its use by lawyers fighting structural sexism. By the 1960s and 1970s, anti-discrimination theory and Equal Protection Clause doctrine had become the preferred tools for Ruth Bader Ginsburg and other lawyers who were working to secure sex equality for females.

Among the revolutionary legal reforms related to sex that relied on equality theory: the Nineteenth Amendment (prohibiting sex-based restrictions on voting rights); the inclusion of “sex” in the Civil Rights Act of 1964 (prohibiting discrimination in employment, public accommodations, and federally funded programs); the Education Amendments of 1972, i.e., Title IX (prohibiting sex

24. *Id.*

25. Kreis, *supra* note 21.

discrimination in education); and the set of sex discrimination cases decided by the Supreme Court starting with *Reed v. Reed* in 1971 (holding that state law could not prefer a male to a female in the assignment of rights and responsibilities all else being equal).²⁶ Although the focus of women's rights advocates was on equality for females given that disenfranchisements, subordinations, and stereotypes were all related directly or indirectly to their sex-linked, reproductive biology, consistent with race-neutral law designed to dismantle structural racism against black people, their vehicle was sex neutral, and thus applicable more broadly not only to men but also to gender nonconforming people who seek equality beyond the binary terms of traditional law. *Obergefell v. Hodges* (holding that it is a violation of the Equal Protection Clause to deny a marriage license to a same sex couple),²⁷ and *Bostock v. Clayton County* (holding that it is a violation of Title VII to discriminate against a transgender woman based on or because of her biological sex),²⁸ were built on the normative philosophy and foundation established in the earlier line of race and sex discrimination cases, and in corresponding federal and state statutory law.

In her majority opinion in the Court's 1996 case *United States v. Virginia*, Justice Ginsburg noted that "[t]oday's skeptical scrutiny of official action denying rights or opportunities based on sex responds to volumes of history."²⁹ The law's skepticism in this context has only increased in the last half century. When the Court decided *Reed* in 1971, it described the Equal Protection analysis applicable to sex cases this way:

In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to States the power to treat different classes of persons in different ways. The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."³⁰

This "rational basis" test for judging the lawfulness of distinctions on the basis of sex was redescribed and updated by the Court in its 1976 decision in *Craig v. Boren*.³¹ Writing for the majority in *Craig*, Justice O'Connor explained that "[t]o withstand constitutional challenge, previous cases establish that classifica-

26. 404 U.S. 71 (1971) (as applied in this case the state could not in the name of judicial efficiency prefer a male to a female in the appointment of an estate executor). This line of cases is summarized by Justice Ginsburg in her majority opinion in *United States v. Virginia*, 518 U.S. 515, 531 (1996). For the broader purposes of this paper see, e.g., *Stanton v. Stanton*, 421 U.S. 7 (1975) (holding that it is unconstitutional to distinguish on the basis of "old notions" of male and female sex roles in setting the age of majority); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (holding that it is a violation of Title VII to discriminate against a female in the workplace on the basis that she is not conforming to sex stereotypes).

27. 576 U.S. 644 (2015).

28. 140 S. Ct. 1731 (2021).

29. 518 U.S. 515, 531 (1996).

30. 404 U.S. at 75-76 (citations omitted and emphasis added).

31. 429 U.S. 190 (1976).

tions by gender must serve *important* governmental objectives and must be substantially related to achievement of those objectives.”³² This analysis “[i]n light of the weak congruence between gender and the characteristic or trait that gender purported to represent,” made it “necessary that the legislatures choose either to realign their substantive laws in a gender-neutral fashion or adopt procedures for identifying those instances where the sex-centered generalization actually comported with fact.”³³ Thus, the job of the courts would be to ensure that distinctions on the basis of sex were justified by *important* governmental interests and “*closely serve[]* to achieve that objective.”³⁴ In contrast with standard practice under the rational basis test, the Court in *Craig* applied this standard by carefully examining (and then rejecting) the state’s statistically based factual claim that there was a close nexus between its objective and the sex discriminatory means it had chosen to fulfill it.

This “intermediate scrutiny” test, described as such to distinguish it from the “strict scrutiny” that applies to distinctions on the basis of race and national origin, has come to be described as “quasi strict,” coinciding with accreting sex skepticism. Thus, the standard for judging distinctions on the basis of sex is the same—it remains the case that “[t]he state must show ‘at least that the [challenged] classification serves “important governmental objectives and that the discriminatory means employed” are “substantially related to the achievement of those objectives.”’³⁵ However, courts (including *the* Court) today typically add that such distinctions require an “exceedingly persuasive justification.”³⁶ And, commentators and the government periodically question the integrity of the distinction between race and national origin on the one hand and sex on the other.³⁷

III

SEX NEUTRALITY

For historical reasons, reform efforts designed to dismantle structural sexism weren’t initially equality-based,³⁸ but when this legal theory matured as an op-

32. *Id.* at 197.

33. *Id.* at 199.

34. *Id.* at 200.

35. *See, e.g.,* United States v. Virginia, 518 U.S. 515, 533 (1996).

36. *See, e.g., id.* (citing other cases). Justice Ginsburg explained that to pass muster as such, a justification “must be genuine, not hypothesized or invented post hoc in response to litigation. And it must not rely on overbroad generalizations about the different talents, capacities, or preferences of males and females.” *Id.*

37. *See, e.g.,* Kyle C. Velte, *Recovering the Race Analogy in LGBTQ Religious Exemption Cases*, 42 CARDOZO L. REV. 67 (2020); Mrinalini Sisodia Wadhwa, *Bringing Sex Discrimination Under Strict Scrutiny: The Need for an Equal Rights Amendment*, COLUM. UNDERGRAD. L. REV., Dec. 29, 2020; Deborah L. Brake, *Sex as a Suspect Class: An Argument for Applying Strict Scrutiny to Gender Discrimination*, 6 CONST. L. J. 953 (1996); John Galotto, *Strict Scrutiny for Gender*, Via Croson, 93 COLUM. L. REV. 508 (1993); Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143 (1978).

38. *See, e.g.,* Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 GEO. L. J. 1359

tion and consensus coalesced around its utility beyond race, two contradictory things happened: On the one hand, enormous but incomplete progress was made in the movement toward good lawmaking around sex differences, including but not limited to parity between the sexes. On the other, because of the details of the doctrine and associated politics, the possibilities for the law to be the institution that would support finishing the job diminished significantly.

Moreover, an effect of the focus on and success of equality theory has been that the law and those who work in the field today largely now conceive of sex through this prism. This means that any reference to sex in law is presumptively suspect—probably bad discrimination—in the same way that any reference to race in law is suspect and probably bad discrimination. Underlying this phenomenon are the twin premises that sex is more like race than it is like other taxonomies, and that like distinctions on the basis of race, most or all sex-linked regulation is based in false and damaging stereotypes, rather than in real, natural, and welfare-promoting differences the law properly takes into account.

Equality doctrine does leaves room for proponents of sex-linked measures to rebut the presumption that they are bad discrimination on these real, natural, and welfare-promoting grounds. As I have written elsewhere, quoting Justice Ginsburg in *United States v. Virginia*,³⁹

“[i]nherent differences’ between men and women . . . remain a cause for celebration, but not for denigration of the members of either sex or for artificial constraints on an individual’s opportunity.” Sex classifications . . . are unacceptable when they serve to subordinate women in ways that are not warranted by inherent differences but acceptable when they are so justified and serve the anti-subordination project. “Sex classifications may be used to compensate women ‘for particular economic disabilities [they have] suffered,’ to ‘promot[e] equal employment opportunity,’ [and] to advance full development of the talent and capacities of our Nation’s people. But [they] may not be used, as they once were, to create or perpetuate [women’s] the legal, social, and economic inferiority.”⁴⁰

However, because the justification for sex-based measures has progressively narrowed and equality-based rebuttals are preferred, the doctrine serves to reinforce the sense that sex is (only) an equality issue rather than equality law being a tool to address bad sex discrimination. Given that equality advocates increasingly argue that all sex differences are impermissible stereotype, and that affirmative action is increasingly disfavored as tool to address disparities, this is not a distinction without a difference.

Support for these specific propositions, as well as for the final move to sex neutrality in the law generally, exists on the right and the left, among proponents who are motivated by theory, pragmatism, and politics.

Thus, from the right it is said: law that demands equality should express equality; liberal justice norms are inconsistent with all forms of group-based af-

(1982-1983) (detailing the origins of these reforms); *Bradwell v. Illinois*, 83 U.S. 130 (1872) (arguing from the Fourteenth Amendment’s Privileges and Immunities Clause that females should be entitled to become practicing lawyers on the same bases as males).

39. *United States v. Virginia*, 518 U.S. at 533–34.

40. Coleman, *Sex in Sport*, *supra* note 3, at 69.

firmative action; and “the way to stop discrimination on the basis of [“x”] is to stop discriminating on the basis of [“x”].”⁴¹ Consistent with these positions, for example: Individuals and groups have cribbed from the playbook developed by advocates who oppose race-based affirmative action to challenge special programs and set-asides for females on boards and in educational settings.⁴² Related groups have worked—sometimes alongside progressive women’s groups and transgender rights advocates—to desegregate conscription.⁴³ And Republicans on the Hill have blocked legislation such as the Paycheck Fairness Act designed to address disparities in compensation that disproportionately affect women.⁴⁴

Although some on the right who take these positions are philosophically motivated, others are pragmatic or mercenary, i.e., driven specifically to increase opportunities on the ground for their constituents operating in these arenas. However, the effects of their sex-neutral strategy are more comprehensive, as they have the tendency to dissuade the development, maintenance, and promotion of valuable—and as of this writing still lawful—sex-linked approaches and projects. It’s easier even if it’s not better to go the sex neutral route, especially for institutional risk managers.

In turn, from the left it is that said: equality depends on seeing sex as a social construct which can and should be dismantled; even if sex is real, “bioessentialist” approaches hinder the feminist equality project; and thus, it would be best on balance for everyone—including for females—if the law would insist on sex-blindness.⁴⁵ Consistent with these positions, for example: Advocates have pushed for and Democrats in the United States House of Representatives have twice passed the Equality Act, which omits the standard binary (reproductive)

41. *Parents Involved in Community Schools v. Seattle School District No. 1*, 551 U.S. 701, 748 (2007) (quoting majority opinion authored by C.J. John Roberts using the word “race” in the place of “x”).

42. Jody Godoy, *9th Circuit Revives Challenge to California Women on Boards Law*, REUTERS (June 21, 2012), <https://www.reuters.com/legal/litigation/9th-circuit-revives-challenge-california-women-boards-law-2021-06-21/> (last accessed Jan. 11, 2022); Teresa Watanabe, *Women-only STEM College Programs Under Attack for Male Discrimination*, L.A. TIMES (Aug. 20, 2019), <https://www.latimes.com/california/story/2019-08-20/women-only-science-programs-discrimination-complaints> [<https://perma.cc/C9PH-DVLT>].

43. Robert Barnes, *Groups ask Supreme Court to declare the all-male military draft unconstitutional*, WASH. POST (Feb. 18, 2021), https://www.washingtonpost.com/politics/courts_law/supreme-court-military-draft/2021/02/18/041299ca-713b-11eb-85fa-e0ccb3660358_story.html [<https://perma.cc/M4EX-DHQ4>].

44. Ledyard King, *‘A fundamental issue of fairness’: Paycheck Fairness Act bill to address gender pay gap blocked by Senate Republicans*, USA TODAY, June 8, 2021.

45. Madeleine Pape, *Feminism, Trans Justice, and Speech Rights: A Comparative Perspective*, 85 LAW & CONTEMP. PROBS., no. 1, 2022 (describing and working with these arguments); Lea Skewes et al., *Beyond Mars and Venus: The role of gender essentialism in support for gender inequality and backlash*, PLOS ONE (July 4th, 2018), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0200921> [<https://perma.cc/4X8H-44U2>] (making these arguments); HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* (2017); Alice Dreger, *The Social Construction of Sex*, PAC. STANDARD (Mar. 21, 2014), <https://psmag.com/social-justice/social-construction-sex-77099> [<https://perma.cc/7MW9-JFMT>] (commenting on the claim that sex is socially constructed from the perspective of bioethics and the history of science).

definition of “sex” from its definitions, prohibits distinctions on the basis of sex characteristics, and (to the time of this writing) includes no exceptions.⁴⁶ Frustrated that it hasn’t gotten traction in the Senate,⁴⁷ and maybe also that the Supreme Court didn’t give progressives a clean win in *Bostock*,⁴⁸ the Biden Administration has begun to argue in briefs filed in federal court that, as a matter of existing statutory and regulatory law, it’s unlawful to discriminate on the basis of sex or sex traits, even within otherwise lawful sex classifications.⁴⁹ And some progressive legal scholars have argued that the government should no longer record sex on birth certificates.⁵⁰

46. Equality Act, H.R. Res. 5, 116th Cong. (2019); *see also* Equality Act, H.R. Res. 5, 117th Cong. (2021) (omitting the standard definition of “sex” as “biological sex” from its definition, prohibiting without exception all distinctions on the basis of sex in all federal programs and public accommodations, and rejecting the law’s traditional brick-and-mortar definition of the latter). The policy choice not to include the standard definition is notable for many reasons, including that earlier legislation didn’t (see the need to) define it because its meaning was taken as a given; thus, were the legislation to become law, going forward someone looking for a definition of sex in federal law would land on the bizarre disconnect between how the citizenry defines it and what the law says it is.

47. Mike DeBonis, *The Push for LGBTQ Civil Rights Stalls in the Senate as Advocates Search for Republican Support*, WASH. POST (June 20, 2021), https://www.washingtonpost.com/politics/senate-lgbtq-equality-act/2021/06/19/887a4134-d038-11eb-a7f1-52b8870bef7c_story.html [https://perma.cc/52WW-T8L5].

48. *See generally* *Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1756 (2020). The Court in *Bostock* retained the traditional definition of “sex” as “biological sex” and, because the facts didn’t tee up the question, it left for another day the most polarizing question whether traditional exceptions to general nondiscrimination rules—e.g., sex segregated restrooms, locker rooms, competitive sport, prisons—are lawful.

49. *See, e.g.*, Brief in Support of Statement of Interest of the United States, *Jackson v. West Virginia Board of Education*, No. 2:21-cv-00316, (S.D. W. VA June 17, 2021) (arguing that “[a]lthough [Title IX’s implementing regulations] allow recipients to operate or sponsor separate [sports] teams based on sex, . . . [w]hen assigning students to single-sex sports teams, a recipient must still comply with the statutory prohibition against discrimination based on sex in Title IX itself”). The Administration may well be right as a matter of current administrative law, but its position is undoubtedly contrary to the legal history of Title IX, and to the only viable rationale for sex classifications in competitive sport. *See generally* Doriane Lambelet Coleman, Michael J. Joyner, Donna Lopiano, *Reaffirming the Value of the Sports Exception to Title IX’s General Nondiscrimination Rule*, 27 DUKE J. GENDER L. & POL’Y 69 (2020). The effect of the Administration’s argument more generally, i.e., also beyond sport, would be to allow both males and females to enter spaces and claim opportunities set aside for males (or boys and men) or females (or women and girls). For analyses of the meaning of the operative words see the essays by Edward Schiappa, Kathleen Stock, Joshua Safer, and Madeline Pape in this issue, 85 LAW & CONTEMP. PROBS., no. 1, 2022. To the extent these spaces and opportunities were originally carved out for legitimate sex-linked purposes, they would be hard pressed to fulfill their objectives. More fundamentally, the resulting categories would be meaningless. Thus, if the Administration’s tacit goal is to dismantle the categories, the strategy could well be effective. This would align it with mostly conservative men’s groups that contest set asides on campus for females: If institutions are going to carve out such spaces and opportunities, they say, these can’t be exclusive, anyone must be permitted to join and play regardless of the impact of their inclusion on the project. *See supra* note 42 and accompanying text. On the other hand, if the Administration is actually trying to thread the needle that is maintaining important sex classifications, just reimagined in a sex-neutral way—as in, we’ll still have men’s and women’s this and that, but, e.g., a women’s “x” might include both a male and a man—it’s taking an extraordinarily risky legal and political gamble.

50. *See, e.g.*, V.M. Shteyler, Jessica A. Clarke, & E.Y. Adashi, *Failed Assignments: Rethinking Sex Designations on Birth Certificates*, THE NEW ENGLAND J. OF MED. (2020); Davis, *supra* note 45 at 25-53.

Although some on the left may be motivated by a commitment to neutrality qua neutrality, advocates for these positions mostly appear to be using neutrality as a strategy specifically in support of rights for gender nonconforming people. However, given how it's been designed and rolled out, its effects would undoubtedly comprehend more. Indeed, it is difficult to see how any positive sex-linked measure—whether designed to address inequality, safety, privacy, health, or even pregnancy—could survive these progressive positions, at least as they are currently described. Thus, while the Court still provides for the possibility that legislatively enacted sex affirmative measures could pass constitutional muster, the legislature itself may foreclose it. It is presumably because the left has traditionally been seen as the home of advocates for women and girls that their proponents have found it necessary emphatically to insist that these measure are good for women too.⁵¹

The problem with the focus on equality, and with the move to neutrality within that framework, is that like age, sex is real—it's not just a socially constructed taxonomy based on stereotype like race that we can relegate to the ash heap of history;⁵² it will always matter in ways that transcend individual interests and that are relevant to good governance, whether they're a net good, a net harm, or simply value-neutral; and thus, the law needs to take sex into account as it fulfills its institutional role.⁵³ Again, at its most basic, that role is to provide

51. “How?” is the response from a lot of feminists, hence the internecine war among “feminisms” described by Madeleine Pape in this volume. Pape, *supra* note 45. See also SCHIAPPA, THE TRANSGENDER EXIGENCY, *supra* note 6 at Chapter 9 (describing competing feminist accounts on the question how to define “woman”). As far as I can tell, efforts by proponents on the left to substantiate the argument that sex neutrality in law would be good for females (too) have been limited to further arguments, not to evidence, e.g., to the two-pronged argument that (1) all or most all sex is stereotype, and (2) sex stereotypes are especially bad for females. As the positive outcome in *Bostock* made clear, however, one doesn't need to redefine sex or to prohibit all discrimination on the basis of sex to deal with harmful stereotypes or to address the needs of vulnerable subpopulations.

52. See *supra* notes 1–7.

53. See *supra* Part II (introductory paragraphs). Heath Fogg Davis makes a progressive case against the relevance of sex to governance in *BEYOND TRANS: DOES GENDER MATTER?* See HEATH FOGG DAVIS, *BEYOND TRANS: DOES GENDER MATTER?* (2017). Specifically, he describes the trans experience with sex classifications and then argues that we should use the lessons it teaches not only toward law reform for transgender people but for everyone. Davis's thesis is that we would *all* be better off in a society that paid a lot less attention to sex. Thus, he argues, “people who are ‘cisgender’ . . . are harmed on an existential level [by sex-classifications because such] policies constrict everyone's personal freedom to imagine and define not just our gender expression of masculinity and femininity, but also our authority to make self-regarding decisions about our sex identities—about who we are in relation to the categories of male and female.” *Id.* at 13. Ultimately, Davis's argument didn't persuade me because it tends to assume things about cisgender people and their relationship to sex from a gender nonconforming world view; it tends to conflate sex with gender and gender stereotypes, and we don't need additional law reform to address the latter; and, focused as it is on individual interests, it too quickly dismisses what are (for me) legitimate collective interests. But the challenge to institutions to audit, justify, and explain the retention or dismantling of existing sex classifications is important, and the analysis of sex and identity documents, public bathrooms, and college admissions is provocative. For a correction of the factual errors in the chapter on competitive sports about Caster Semenya, the Rio Olympics, and international sports eligibility rules, see *Mokgadi Caster Semenya & Athletics S. Afr. v. Int'l Ass'n of Athletics Federations*, Arbitral Award, CAS 2018/O/5794 & 5798 (June 18, 2018), available at https://www.tas-cas.org/fileadmin/user_upload/CAS_Award_-_redacted_-_Semenya_ASA_IAAF.pdf;

for physical order, continuity or sustenance, and protection; and when a political community has the luxury and inclination to go beyond the basics, the law is also the institution that further orders society—and fixes problems—according to prevailing norms and dictates. Although liberty and equality are among the most important of these today, the law continues to “order” their exercise as needed in the interests of the community.⁵⁴

Thus, beyond the interests of the individual and prevailing liberty and equality norms, sex is a politically significant good because it is necessary for human reproduction and for the wellbeing and viability of a community. Like age and the life cycle, sex is a collective necessary: we need (and so we want) both males and females in a community just as we need (and so we want) children, adolescents, and adults in our midst.⁵⁵ (This is true for all sub-populations, including LGBTQ communities. Language wars amongst us notwithstanding, that sex is a net good in these respects isn’t a “cis-heteronormative” proposition.⁵⁶) Through the tools established by law, the government thus records and monitors both sex and age and it provides for the sharing of this information so that affected institutions and individuals can make related decisions. It also stands ready to act either to correct imbalances or to adjust policies to address their effects. In the United States we are not as familiar as we used to be, and as some other countries still are, with state-sponsored initiatives designed to ensure balance between males and females and steady population growth, but we do see work being done on the repercussions of imbalances, for example in connection with female longevity and the Social Security trust funds, and on declining male labor force participation rates. Our sex is undoubtedly personal in the first instance, and then significant for others who would engage with us in relevant ways, but it’s also public in the respects that touch on these basic collective in-

see also Doriane Lambelet Coleman, *Semenya and ASA v IAAF: Affirming the Lawfulness of a Sex-Based Eligibility Rule for the Women’s Category in Elite Sport*, 2019 INT’L SPORTS L. REV. 83 (2019) (summarizing the facts in the case and addressing mistakes in the public record).

54. As a matter of political philosophy, our government is “liberal”—as in devoted to individual liberty. As a matter of legal doctrine, the government can violate individual liberty and equality interests if it has a compelling reason for doing so and if the means it chooses to accomplish its ends are narrowly tailored. Thus, we live in a system of “ordered liberty.” Doriane Lambelet Coleman, *The Seattle Compromise: Multicultural Sensitivity and Americanization*, 47 DUKE L. J. 717, 718–19 (1998).

55. I note but don’t entertain the arguments from animal husbandry that we don’t actually need males since, via cloned sperm, females can reproduce without them. see, e.g., H. Tournaye, *Is there any reproductive future left for men*, 4 FACTS, VIEWS & VISION: ISSUES IN OBSTETRICS, GYNECOLOGY AND REPRO. HEALTH 255 (2012) (responding to Germaine Greer on the relevance of males to reproduction); and from some gender theory that, reproduction aside, sex shouldn’t matter because we should be attracted to people for who they are not for their “bits,” see, e.g., Dr. Rachel McKinnon (@rachelmckinnon), TWITTER (Sept. 30, 2019) (screenshot on file with author) (“sexual genital preferences is immoral. Most people don’t date genitals, we date ‘people’ who have genitals. If a girl has a funny looking vagina, I don’t just stop dating her. I make it work. Date genders, and just learn how to have fun with their sexy fun time bits, whatever they happen to be.”)

56. It is also good and true for isolated, single-sex religious orders which would all have a built-in expiration date were in not for sex differences outside of their ranks. As we learned from the experience with slavery, the only way to sustain a population if you can’t import it is for females to procreate. See *supra* notes 13–15 and accompanying text.

terests. Resisting the latter is either a community-defeating proposition or an exercise in free riding.

Sex is a politically significant net neutral in that human dimorphism—what the law calls our “inherent differences”⁵⁷—goes beyond that which might be described as good or celebrated, simply to what is. Well-intended political arguments against centering biology aside, we have not in the last fifty years escaped nature, and all of the theorizing in the world won’t make that happen. As with other animal species, human males are built differently than human females. The effects of this difference are that the two groups often perform different roles; and they develop, age, and respond differently to illness and the environment.

That our sexual dimorphism isn’t as pronounced as it is in other animal species, and that technology and deindustrialization have reduced the numbers of people for whom those differences are relevant, means that role differentiation tends increasingly to be limited to physical—including reproductive—activities. Still, the data continue to reflect categorical differences.⁵⁸ These differences should be further reduced as remaining unjustified discrimination is addressed, but some (especially in physically dependent sectors) will inevitably remain.

Similarly, the binary way our bodies develop, age, and respond to illness and the environment is an increasingly—not decreasingly—significant field of biomedical study precisely because it is relevant both to the development of personalized medicine and to public health. Thus, as the Institute of Medicine (IOM) described in its 2001 report *Exploring the Biological Contributions to Human Health: Does Sex Matter?*, sex exists “beyond the reproductive system.”⁵⁹ Not only does “every cell ha[ve] a sex,” but its operation is significant “[f]rom cognition to metabolism and response to chemicals and infectious organisms.”⁶⁰ We tend to be most familiar with these differences from the gov-

57. See *United States v. Virginia*, 518 U.S. 515, 533 (1996).

58. See, e.g., *Chapter 2: Women at work: who are they and how are they faring?* in OECD EMPLOYMENT OUTLOOK (2002), available at <https://www.oecd.org/employment/emp/17652667.pdf> [<https://perma.cc/8DTS-PMKZ>] (providing data and analysis on persistent sex disparities across OECD countries in the workforce at home); Raynor de Best, *Share of male and female employees in the construction industry in the United States from 2002 to 2020*, STATISTA (July 9, 2021), <https://www.statista.com/statistics/434758/employment-within-us-construction-by-gender/> [<https://perma.cc/H79M-MX24>] (“In 2020, just under 89 percent of the 10.7 million people employed in the U.S. construction industry were male”); *Coal Miner Statistics and Facts in the US*, ZIPPPIA (last updated Sept. 9, 2021), <https://www.zippia.com/coal-miner-jobs/demographics/> [<https://perma.cc/92F3-GSFM>] (“There are over 13,185 Coal Miners currently employed in the United States . . . 93.9% are men”); *Fireman Statistics and Facts in the US*, ZIPPPIA (last updated Sept. 9, 2021), <https://www.zippia.com/fireman-jobs/demographics/> [<https://perma.cc/3ATL-ZPTF>] (“83.0% [of firefighters] are men”); Associated Press, *1st Female Sailor Completes Navy Special Warfare Training*, VOA (July 17, 2021), https://www.voanews.com/a/usa_1st-female-sailor-completes-navy-special-warfare-training/6208370.html [<https://perma.cc/GY66-92S7>] (the number of Navy Seals who are female can still be counted on one hand).

59. National Institutes of Health (NIH) & Institute of Medicine (IOM), *Exploring the Biological Contributions to Human Health: Does Sex Matter?* (Theresa M. Witzmann & Mary-Lou Pardue eds., 2001), available at <https://www.ncbi.nlm.nih.gov/books/NBK222288/> [hereinafter IOM Report].

60. *Id.* On sex differences in cognition see, e.g., Bruce Goldman, *Two minds: The cognitive differ-*

ernment's age tables, which track the population by sex and consistently show a gap between male and female longevity, but COVID-19 has also made us at least passingly familiar with the fact of sex differences in immunology. As microbiologist Sabra Klein and colleagues described in a paper titled *Biological sex impacts COVID-19 outcomes*, “[t]he current novel coronavirus disease 2019 (COVID-19) pandemic is revealing profound differences between men and women in disease outcomes worldwide.”⁶¹ In an effort to address the “inconsistent reporting and analyses of male–female differences in COVID-19 cases, hospitalizations, and deaths” in the United States, their explanatory work “highlight[s] the mechanistic differences including in the expression and activity of . . . [certain] enzyme[s] as well as in antiviral immunity.”⁶² It also “highlight[s] how sex differences in comorbidities, which can be associated with both age and race, impact male-biased outcomes from COVID-19.”⁶³ Klein, of Johns Hopkins University's Bloomberg School of Public Health, is part of a group of researchers who, in partial response to the 2001 IOM report and NIH requirements for federally funded projects to take sex differences into account, have established centers of excellence at research hospitals around the country designed specifically to do such work.⁶⁴

Characterizations of sex and the bimodal distribution of sex traits as fiction and as misunderstandings of the underlying science,⁶⁵ or as harmful to particular vulnerable populations and so on balance better left out of polite conversation,⁶⁶ are not only wrong as a factual matter, they are also self- and community

ences between men and women, STANFORD MED. (2021), <https://stanmed.stanford.edu/2017spring/how-mens-and-womens-brains-are-different.html> [<https://perma.cc/8Y6J-U4GB>]. On sex differences in metabolism, see, e.g., Karthickeyan Chella Krishnan et al., *Sex differences in metabolism and cardiometabolic disorders*, 29 CURRENT OP. IN LIPIDOLOGY 5 404, 404–10, available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6382080/>. On sex differences in response to chemical exposures, see, e.g., Anna Holthaus, *The Gender Dimension: Why chemical exposure affects each sex differently*, GENDER & CHEMICALS (Mar. 21, 2019), <http://gender-chemicals.org/the-gender-dimension-why-chemical-exposure-affects-each-sex-differently> [<https://perma.cc/V76D-5RS3>]. On sex differences in response to infectious organisms, see, e.g., Laetitia Gay et al., *Sexual morphism and Gender in Infectious Disease*, FRONTIER IMMUNOLOGY (July 22, 2021), <https://www.frontiersin.org/articles/10.3389/fimmu.2021.698121/full> [<https://perma.cc/EWT4-DJQ4>]. On sex differences in organ matching, see, e.g., Haley Bridger, *Sex differences influence organ transplant rejection rate*, THE HARV. GAZETTE (Mar. 22, 2018), <https://news.harvard.edu/gazette/story/2018/03/gender-may-play-key-role-in-rejection-of-transplanted-organs/> [<https://perma.cc/5AQ6-A6VM>].

61. Sabra L. Klein et al., *Biological Sex Impacts COVID-19 Outcomes*, PLOS PATHOGENS (June 22, 2020), <https://journals.plos.org/plospathogens/article?id=10.1371/journal.ppat.1008570> [<https://perma.cc/Z2Q5-YH7P>].

62. *Id.*

63. *Id.*

64. See IOM Report, *supra* note 59; Sabra L. Klein, PhD, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (last visited Jan. 6, 2022), <https://publichealth.jhu.edu/faculty/1038/sabra-l-klein> [<https://perma.cc/NB7A-DTDR>].

65. See, e.g., Katrina Karkazis, *The Misuses of “Biological Sex”*, 394 THE LANCET 10212, 1898–99 (2019); Anne Fausto-Sterling, *Why Sex Is Not Binary*, N.Y. TIMES (Oct. 25, 2018); Lindsay Parks Pieper, *‘Preserving la difference’: The elusiveness of Sex-Segregated Sport*, 19 SPORT SOC’Y 1138, 1139 (2016).

66. This article, for example, appears in an issue of the journal LAW & CONTEMPORARY

defeating propositions. Although some might not want to acknowledge this publicly, we all—including those who push these positions most aggressively—rely on valuable instances of institutional attention to sex differences.

In contrast with undoubtedly good and generally neutral sex differences, some differences—the ones that have mostly captured our attention over the last fifty years or so—are undoubtedly bad, but again in both individual and politically significant ways:

Females as a group continue to experience vastly disparate rates of sexual violence; opportunity, income, and wealth disparities; and skewed childrearing responsibilities.⁶⁷ If we thought before #MeToo and COVID-19 that equality law had solved all of these problems, or at least that an equality-driven trajectory was established so that we could afford to shift our attentions elsewhere, including to sex neutrality, we've gotten a real wake-up call since: Rape and domestic violence (as always mostly of females) are pervasive nationally and worldwide, to the point where we are being re-introduced to the term “femicide”; indeed, things got so bad at one point during the height of the pandemic that some countries curbed alcohol sales in an effort to mitigate the numbers.⁶⁸ While both men and women are only slowly returning to the work force, more women than men are remaining at home; the Omicron variant has only exacerbated this particular sex difference.⁶⁹ Beyond the pandemic, more women are

PROBLEMS titled *SEX IN LAW*, which was protested by some of the students associated with its student board on the grounds that authors would use terms including “biological sex” and “male” and “female” and then argue—or engage with the argument that—we should be able to make distinctions among individuals and groups on the basis of that biology. Consistent with or derived from the playbook produced by certain rights organizations, the students’ argument was that doing these things would be harmful to the transgender community; there are some words and topics, they said, that should be off the table. For me, it’s entirely possible to see transgender people, to know they are who they say they are, to be caring and kind, and to believe they are equally worthy of respect *in life and in law* without ignoring critical facts and censoring valuable words and discussions.

67. See e.g., *Fact Sheet: National Strategy on Gender Equity and Equality*, THE WHITE HOUSE (Oct. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/10/22/fact-sheet-national-strategy-on-gender-equity-and-equality/> [<https://perma.cc/DN2E-A3BZ>] (describing the broad range of ongoing disparities); SCHIAPPA, THE TRANSGENDER EXIGENCY, *supra* note 6 at 152–53 (focusing specifically on disparities with respect to violence and economics); Noya Rimalt, *The Maternal Dilemma*, 103 CORNELL L. REV. 977, 1047–48 (2018) (describing persistent disparities related to child-care).

68. See, e.g., Aris Folley, *Lawmakers in both parties to launch new push on Violence Against Women Act*, THE HILL (Jan. 2, 2022), <https://thehill.com/homenews/house/587204-lawmakers-in-both-parties-to-launch-new-push-on-violence-against-women-act> [<https://perma.cc/22TF-AA43>]; Jamila Bey, *Black Girls and Women Killed at Rate of 4 Per Day in 2020 as Homicides Increased: The FBI and CDC Found that Black Girls and Women were the Most Often Killed Among Female Demographics Last Year*, BET (Oct. 7, 2021), <https://www.bet.com/article/jhv4x4/black-girls-and-women-killed-at-greater-rates-in-2020> [<https://perma.cc/HY56-UEVE>]; *The Impact of Banning Alcohol During Covid-19*, BBC (Sept. 9, 2021), <https://www.bbc.com/worklife/article/20200917-the-impact-of-banning-alcohol-during-covid-19> [<https://perma.cc/RS6K-V6GK>].

69. See, e.g., Amanda Preacher, *Omicron Creates Uncertainty for Women’s Labor Participation Rate*, MARKETPLACE, Dec. 27, 2021, <https://www.marketplace.org/2021/12/27/omicron-creates-uncertainty-for-womens-labor-participation-rate/> [<https://perma.cc/96G3-ZKSP>] (describing general pandemic effects and focusing on Omicron).

raising kids on their own,⁷⁰ and increasingly, children's future prospects—whatever their sex—depend on their mothers' status and circumstances.⁷¹ Adolescent girls are in crisis, suffering epidemic levels of anxiety and depression.⁷² Equality law has done a lot of good on all of these fronts; life for females in general was undoubtedly worse on any number of measures in the past. I certainly wouldn't be in a position to write and publish this article as a tenured law professor were it not for equality-driven opportunities. Still, the evidence of ongoing, broadly felt, deeply-entrenched disparities is also irrefutable.

Less well reported but increasingly of concern in this period are the different harms encountered by, or that mostly affect, males. Although alarm bells were initially sounded by men's groups and by conservatives,⁷³ the data being what they are, others are taking note. For example, progressive journalist Liza Featherstone recently wrote in *THE NEW YORK TIMES* on *The G.O.P.'s Mission to Save Men*⁷⁴ as follows:

Deindustrialization has stripped many men of their ability to earn a decent wage, as well as of the pride they once took in contributing to prosperous communities. Boys are sometimes over-disciplined and over-medicated for not conforming to behavioral expectations in school. And while more women than men are diagnosed with anxiety or depression, men are more likely to commit suicide or die of drug overdoses.⁷⁵

In an important, refreshingly honest nod to the politics of the issue, Featherstone added that although

70. See e.g., SCHIAPPA, *THE TRANSGENDER EXIGENCY*, *supra* note 6 at 152–53 (citing statistics on how unequal life is for women with respect to violence and economics); Rimalt, *The Maternal Dilemma*, *supra* note 67 at 1047–48 (arguing that the choice to go sex neutral with the Family and Medical Leave Act combined with “legal narratives presenting the rise of egalitarian and choice-based patterns of parenting as actual products of contemporary parental policies”).

71. See, e.g., Quoc Trung Bui & Claire Cain Miller, *The Age That Women Have Babies: How a Gap Divides America*, *N.Y. TIMES* Aug. 4, 2018, <https://www.nytimes.com/interactive/2018/08/04/upshot/up-birth-age-gap.html> [<https://perma.cc/K7JP-X8FR>]; Emily Badger et al., *Income Mobility Charts for Girls, Asian-Americans and Other Groups. Or Make Your Own.*, *N.Y. TIMES* Mar. 27, 2018, <https://www.nytimes.com/interactive/2018/03/27/upshot/make-your-own-mobility-animation.html> [<https://perma.cc/K4R8-R2J5>].

72. *The U.S. Surgeon General's Advisory, Protecting Youth Mental Health*, HHS.GOV (2021), <https://www.hhs.gov/sites/default/files/surgeon-general-youth-mental-health-advisory.pdf> [<https://perma.cc/9KSX-8XYE>] (providing details of disparities by sex and race); Matt Richtel, *Surgeon General Warns of Youth Mental Health Crisis*, *N.Y. TIMES* (Dec. 7, 2021), <https://www.nytimes.com/2021/12/07/science/pandemic-adolescents-depression-anxiety.html> [<https://perma.cc/KE9B-EGFN>] (including sex disparities); Jean Twenge, *Why teen depression rates are rising faster for girls than boys*, *THE CONVERSATION* (Jan. 16, 2020), <https://theconversation.com/why-teen-depression-rates-are-rising-faster-for-girls-than-boys-129732> [<https://perma.cc/DX7U-7U93>].

73. Economist Nicholas Eberstadt of the American Enterprise Institute has done especially notable work on this subject. See, e.g., *MEN WITHOUT WORK: AMERICA'S INVISIBLE CRISIS* (2016), digested in *The Idle Army: America's Unworking Men*, *WALL ST. J.* (Sept. 1, 2016), <https://www.wsj.com/articles/the-idle-army-americas-unworking-men-1472769641> (last accessed Jan. 12, 2022).

74. The title above appeared in the hard copy version of *THE NEW YORK TIMES* on December 5. Her piece appears online with a December 4 publication date under the bait-ier headline *Josh Hawley and the Republican Obsession With Manliness*. See, Liza Featherstone, *Josh Hawley and the Republican Obsession With Manliness*, *N.Y. TIMES* (Dec. 4, 2021), <https://www.nytimes.com/2021/12/04/opinion/josh-hawley-republican-manliness.html> [<https://perma.cc/4USR-BRTA>].

75. *Id.*

[n]one of these problems are caused by liberals . . . liberalism hasn't offered a positive message for men lately. In the media, universities and other liberal institutions, it sometimes seems that every man is potentially guilty of something. As Mr. [Josh] Hawley puts it, men are being told by liberals that "they're the problem." Our side – the progressive side – has struggled to articulate what a 'nontoxic' masculinity might look like or models of how to become men.⁷⁶

Featherstone concluded, in the inevitable language of the binary: "The left will need to find a better way to talk to men; half of the population is far too many people to abandon."⁷⁷

Elsewhere, in QUILLETTE, data scientist and criminologist Vincent Harinam's recent essay on *Mate Selection for Modernity* explores other important sex disparities in societally significant behavior, including in marriage and reproduction, education, and the labor force.⁷⁸ All are disparities that are increasing (getting worse) not decreasing (getting better). Thus, on reproduction:

[A] report put out by Morgan Stanley in 2019 . . . forecasts that 45 percent of working women between the ages of 25 and 44 will be single and childless by 2030, the largest share in history. Single women are expected to grow by 1.2 percent annually from 2018–2030 compared with an 0.8 percent growth for the overall US population. By 2030, the percentage of single women will outpace that of married women.⁷⁹

On education: "There is an average yearly surplus of 2.2 million female undergrad enrollees between 2020 and 2029. Between 2030 and 2039, this number increases to 2.3 million. Cumulatively, there will be a whopping 45.1 million women without an equally educated male partner between 2020 and 2039."⁸⁰ This disparity matters because, unlike males, females tend not to mate "down."⁸¹ Some of these women are or will be lesbians or bisexual and so they won't mind, but the remaining numbers are daunting. Finally, on labor force participation:

male labour force participation rate exhibits a slow but gradual decline, falling from a high of 87 percent in 1950 to a low of 68 percent in 2019. Excluding the 2020 COVID-19 lockdown, male labour force participation has fallen by 0.1 percent each month since 1950. Moreover, there has been a 5.4 percent drop since 2005. Based on the linear trendline, the male labour force participation rate will continue to decline, falling below 65 percent for the first time by 2040.⁸²

76. *Id.*

77. *Id.*

78. Vincent Harinam, *Mate Selection for Modernity*, QUILLETTE (June 28, 2021), <https://quillette.com/2021/06/28/mate-selection-for-modernity/> [<https://perma.cc/72VE-5BMY>].

79. *Id.*

80. *Id.* See also, e.g., Saul Kaplan, *The Plight of Young Males*, HARV. BUS. REV. (Mar. 9, 2011), <https://hbr.org/2011/03/the-plight-of-young-males> [<https://perma.cc/GLT8-N6MY>]; Richard V. Reeves, *Boys to Men: Fathers, family, and opportunity*, BROOKINGS (June 19, 2015), <https://www.brookings.edu/blog/social-mobility-memos/2015/06/19/boys-to-men-fathers-family-and-opportunity/> [<https://perma.cc/Q8HN-AHC9>]; Carrie Lukas, *Don't Let Political Correctness Blind Us to the Plight of Young Men*, HUFFPOST (June 3, 2016), https://www.huffpost.com/entry/dont-let-political-correc_b_10281196 [<https://perma.cc/K57P-E28E>].

81. Harinam, *supra* note 78.

82. *Id.*

To the extent that these sex-related, harmful disparities can be made to fit within equality theory, the doctrine that gives it life on the ground can be useful to address them; it shouldn't be abandoned as a tool to do affirmative good. As I've written elsewhere with co-authors, in a segment focused on females that can apply also to males:

Although we can imagine a world in which sex were not relevant or defining, in which we classified people on entirely different terms or else not at all, this isn't ours. As ours exists, because sex matters – a lot – so does sex equality. The United Nations is not wrong to think about the world's population as divided in half, males and females,⁸³ because this is how we tend in the first instance to sort ourselves and how our experiences and opportunities line up. They line up this way at least in the first instance without regard to race, class, and gender identity. Because of this, it is also not wrong to make anti-subordination commitments specifically to the female half of the world's population. This is not and should not be the only anti-subordination commitment, but it is a rational and important one.

Sex equality can be achieved in many situations without affirmative consideration of sex, and in this period in the United States, sex-blind policies are preferred. But when sex blindness would be ineffective or insufficiently remedial, sex conscious approaches should be tools in the equality toolbox. These are especially useful in circumstances when, to fix inequities, it is important to see not to erase the female [or male] body.⁸⁴

Such is the case here: The law has to be able to see sex,⁸⁵ it has to be able to name it,⁸⁶ and it has to be able to work on relevantly tailored approaches if it hopes to be effective in the fulfilment of its institutional mission. The contrary hypothesis, that law can still be effective—including in its basic ordering functions but also in satisfying its liberty and equality goals—even if it is sex neutral, may be well grounded in intellectual or political commitments, but as a practical matter it is missing an evidentiary foundation. We know that one-size-fits-all solutions to problems tend not to work as well as tailored ones. As one expert noted recently with regard to adolescent suicide prevention: “The findings” that while both male and female adolescents are in distress, males are more likely than females to commit suicide, “highlight the need for better gender-specific suicide prevention strategies.” He added, “[a]ny time we see shifts in trends by gender we want to be aware, because when we think about suicide prevention,

83. Coleman et al., *supra* note 49 at 100–01.

84. *Id.* See also, Karen Hao, *There's an easy way to make lending fairer for women. Trouble is, it's illegal*, MIT Tech. Rev. (Nov. 15, 2019), <https://www.technologyreview.com/2019/11/15/131935/theres-an-easy-way-to-make-lending-fairer-for-women-trouble-is-its-illegal/>; Keith Cunningham-Parmeter, *(Un)Equal Protection: Why Gender Equality Depends on Discrimination*, 109 Nw. U. L. Rev. 1 (2015).

85. This proposition shouldn't need citations, but they are plentiful. See e.g., BEYONCÉ, *PRETTY HURTS* (Columbia Records 2014) (“You're tryna fix something but you can't fix what you can't see”); KAREN CROMWELL, *YOU CAN'T FIX WHAT YOU CAN'T SEE: AN EYE-OPENING TOOLKIT TO CULTIVATE GENDER HARMONY IN BUSINESS* (2019); Gustavo Razzetti, *You Can't Fix What You Refuse to See*, TLNT (Dec. 18, 2018), <https://www.tlnt.com/you-cant-fix-what-you-refuse-to-see/> [<https://perma.cc/TF8S-TF8U>] (on problems in the workplace); *infra* note 85 and accompanying text (on adolescent suicide prevention strategy).

86. Kathleen Stock, *The Importance of Referring to Human Sex in Language*, 85 LAW & CONTEMP. PROBS., no. 1, 2022.

we want to take into account gender differences.”⁸⁷

Beyond the need for effectiveness, as I noted in my congressional testimony on the Equality Act in 2019, we want to do no harm:

[D]ifferent groups experience inequality for different reasons, at the hands of different people, and in different ways, so that tailoring an effective remedy requires careful attention to those differences. Although the Nation benefits as equality expands, in fact only some amongst us needed the Emancipation Proclamation and *Brown v. Board of Education*. Only some of us need Title IX and the Violence Against Women Act. Approaches to addressing equality that elide relevant differences are not only ineffective; they can actually serve as cover for ongoing inequality.⁸⁸

Finally, for those harmful disparities that are either not about inequality or are simply an awkward conceptual fit—for example, because they’re really public health issues, issues of basic societal ordering, and more like age than like race⁸⁹—it will be invaluable to be able to continue to turn to the state’s general police powers, and to use federal funding mandates and even national security tools to address them. In this context especially, it might be worthwhile not only to turn away from sex neutrality, as policymakers in other western liberal democracies have,⁹⁰ but also to revisit the weight of the presumption that distinc-

87. Jamie Ducharme, *The Gap Between Male and Female Youth Suicide Rates is Narrowing in the U.S.*, TIME (May 17, 2019), <https://time.com/5590344/youth-suicide-rates/> (last accessed Jan. 12, 2022).

88. Equality Act, H.R. Res. 5, 116th Cong. (2019), *supra* note 46; Equality Act, H.R. Res. 5: Hearing Before the U.S. House of Representatives, Committee on the Judiciary, 116th Cong. (2019) (Statement of Doriane Lambelet Coleman), *available at* https://law.duke.edu/sites/default/files/news/Doriane_Coleman_Oral_Testimony_April_2.pdf.

89. Including but beyond medicine: poverty, violence, and workforce participation are examples of such awkward fits. Females aren’t and political communities shouldn’t be looking for equal (access to) poverty, violence, and all sectors of the work and armed forces. Equality is related to these issues, of course, and because of this its doctrine should be in the game; but the effort to sort every statistical disparity into an equality framework is undoubtedly problematic.

90. Although this sometimes takes the form of quotas to address sex inequality that persists despite anti-discrimination regimes, e.g., in the firm and the academy, mostly it is in the form of public health-related measures that recognize that sex is relevant beyond equality. *Compare, e.g.*, Philip M. Berkowitz, *Gender, Diversity, European Quotas, and U.S. Law*, LITTLER MENDELSON P.C. (Sept. 15, 2015), <https://www.littler.com/publication-press/press/gender-diversity-european-quotas-and-us-law> [<https://perma.cc/U47W-JPW>], with Nicole Winchester, *In Focus: Women’s health outcomes: Is there a gender gap?*, UK PARLIAMENT (July 1, 2021), <https://lordslibrary.parliament.uk/womens-health-outcomes-is-there-a-gender-gap/> [<https://perma.cc/U2GK-U7JC>] (“examin[ing] some of the healthcare challenges women face, why they exist and what action the Government is taking to tackle the issue”); European Commission, State of Health in the EU: The state of women’s health in the European Community, *available at* https://ec.europa.eu/health/state/publications/1996_state_women_en [<https://perma.cc/Y3ZD-JTSM>] (report “point[ing] to a number of policy initiatives which could help reduce premature mortality among women in the EC”); THE HEALTH AND WELL-BEING OF MEN IN THE WHO EUROPEAN REGION: BETTER HEALTH THROUGH A GENDER APPROACH, WORLD HEALTH ORGANIZATION, REGIONAL OFFICE FOR EUROPE (Alex Mathieson ed., 2018), *available at* <https://www.euro.who.int/en/publications/abstracts/the-health-and-well-being-of-men-in-the-who-european-region-better-health-through-a-gender-approach-2018> (“identif[y]ing governance mechanisms needed to improve men’s health and well-being, while contributing to gender equality”). Such work is still being done in the U.S. too, of course, although it’s generally still couched in equality-speak, *see e.g.*, *Fact Sheet*, THE WHITE HOUSE, *supra* note 66; *see also* Aris Folley, *Lawmakers in both parties to launch new push on Violence Against Women Act*, THE HILL (Jan. 2, 2022), <https://thehill.com/homenews/house/587204-lawmakers-in-both-parties-to-launch-new-push-on-violence-against-women-act> [<https://perma.cc/AKS5-L5M4>]. Such sex-targeted policies—regardless of their utility and relative

tions on the basis of sex are just like distinctions on the basis of race and probably bad. In a world in which powerful progressives argue, from liberalism and the analogy to race, that sex is mere fiction or at least borderless, and powerful conservatives argue, from liberalism and free market principles, that we should ignore all identity-based taxonomies and let the chips fall as they may, it's to be expected that deeply partisan decisionmakers on both sides of the political spectrum will continue simply to dismiss as "not exceedingly persuasive" any regulatory rationales that don't fit their politics, even if the regulations themselves are essential to the health and welfare of the political community.

Some of my fellow travelers are sure to think that going back to take a second look at whether we got it right at the last juncture can't be the lesson we take from the law's deeply-mixed history with sex. I contend that doing so would make a lot more sense than pretending that the binary doesn't exist or isn't important, and then going for broke on an unsubstantiated theory that we would all be better off if no one outside of our most private spheres paid attention to any of it. Indeed, that very history should teach us that when we put people in boxes—however they're constructed and labeled—and disallow inspection of and action on disparate impacts among subgroups, significant harm can result. There's a difference between bioessentialism and libertarianism on the one hand, and pragmatism on the other. We're not going to agree on sex blindness as a goal—on neutrality qua neutrality—because sex matters too much to too many people for too many different reasons. But maybe we can agree on this: It's important for the law to be able to continue to secure the health and welfare of the community, and that everyone, regardless of their sex, is equal in its eyes, including as to their liberties and responsibilities. If we can agree to this, the question how to reach these ends is one of strategy. Where the approach taken is for some purposes a dead end or insufficiently effective, turning back to revisit earlier approaches, and considering how they can be perfected, should be on the table.

CONCLUSION

The law has been bound up with sex in significant ways throughout our political history. Today, we understand from a deep evidence base that the *structural sexism* that abided across the centuries was harmful, primarily for females because it was patriarchal, subordinating, and occasionally cruel, but also for many males who were significantly boxed in by its terms. We also know from a deep evidence base that the law's recent (in historical time) turn to an equality-driven *sex skepticism* has been enormously remedial, but that it hasn't and by its relatively narrow terms will not be able either to finish the job or effectively to address matters of ongoing significance that are a poor conceptual fit with equality theory. On deck is a move to *sex neutrality*, either as an alternative strategy going forward, or as a goal unto itself. Either way, this last

move is mostly grounded in theory, it does not itself have a deep evidence base: we do not know or have reason to know from libertarianism, intersectionality, or common sense and experience that we would be better off if law could not see or act on the basis of sex, and if it prohibited regulated institutions from doing the same.

In this article, I have focused on the relevance of sex to the law's traditional institutional mission—providing for physical order, continuity, and protection according to prevailing norms and dictates—and I have argued against this final move to sex neutrality. My refrain has been that sex is real, it affects individuals and society in ways—good, bad, and neutral—that are important to good governance, and it is precisely the law's responsibility to take such taxonomies into account as it fulfils its institutional mission. That this institution got it wrong for much of its history isn't a reason to sack the enterprise, but rather to work hard to get it right for everyone. Arguments from theory in favor of sex neutrality—from the right and the left—are intellectually rich but ultimately self-indulgent when law is failing to serve its institutional purposes, the theory in particular is rejected by people who don't want to play along because it has no relevance to their lives, and there's a dearth of evidence that it's acceptable still to impose its terms on the ground that, whether they know it or not, they will actually be better off.